UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

JAKE WALLACE, AN INDIVIDUAL

Case 32-CA-25262

and

HUMAN SERVICES PROJECTS, INC. dba TEEN TRIUMPH

EXECPTION FILED PER ALJ JAY POLLACKS FINDINGS OF FACTS AND CONCLUSIONS OF LAW

To the National Labor Relations Board 1099 14th Street Washington, DC 20570

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I. OVERVIEW

The charging party was employed at non-profit group home(s) operated by a couple; executive director, Marti Fredericks and chief financial officer, Craig Fredericks. Margo Castaneda was the program director, Grover Crump was the direct supervisor. The hearing took place in Oakland, California on March 22-23, 2011. The ALJ ruled that the Respondent had engaged in unfair labor practices and "the Respondent, having discriminatorily discharged Jake Wallace, shall be directed to make Wallace whole for

any and all loss of earnings and other rights, benefits, and privileges of interest, from the date of discharge until November 16, 2010". (JD(SF)-15-11 page 6 par. 45)

The ALJ further ruled "However subsequent to his discharge Wallace threatened Respondent's bookkeeper Tiffany, this coupled with Wallace's threatening behavior towards Craig Fredericks on the day of discharge, in my opinion makes Wallace ineligible for reinstatement". (JD(SF)-15-11 page 6 par. 10).

An amended affidavit of service and amended order transferring proceeding to the Board has been issued (July 27, 2011) and exception to the law judge's decision will now be due on August 24th, 2011.

II THE ISSUES

- a) Whether Wallace threatened Craig Fredericks minutes after being discharged while exiting Marti Fredericks office with verbalizations and hand gestures
- b) Whether absent the "coupled" Craig Fredericks and Kay Tiffany incidents is Wallace qualified for full back pay and reinstatement
- c) Whether Wallace's disqualifying conduct if it did occur lost the protection of the ACT

III EXCEPTIONS

"As Wallace was walking back to the Heather house meeting, Craig Fredericks told Wallace that he would have to leave or Respondent would call the police. Wallace said in a threatening manner "I am not leaving, and if you expect me to leave, you are going to have to come and make me leave this facility." Wallace gestured towards Fredericks to come and fight. Wallace told Fredericks to go ahead and call the police." (JD(SF)-15-11, page(s) 3 & 4, par. 50)

"Only two weeks after Wallace first spoke up, he was fired for alleged insubordination. While unlawful motive is not necessary in order to establish the primary violation in this case, such timing strongly demonstrates the Respondent's unlawful motivation. But what the Employer deems insubordinate, the Act considers protected and concerted. The evidence in this case falls far short of establishing that Wallace's conduct at the May 28, 2010 meeting was so egregious as to render him unfit for further service. To the contrary, the evidence in this case showed that Respondent fundamentally misunderstood the basic right to engage in protected concerted activity. Respondent's repeated expressions of the need to do things "in the proper forum" or to have employees pursue grievances "the right way," are all just code words for Respondent's clear preference for dealing with employees individually where they are more vulnerable and don't have the strength of numbers inherent in concerted activity.

Finally, Respondent has failed to demonstrate that Wallace engaged in any misconduct prior to his employment or after his termination that renders him unfit for further service such that Respondent could deny reinstatement to Wallace. Accordingly, there is no basis for finding that Respondent is precluded from reinstating Wallace or that it is appropriate to toll Wallace's entitlement to back pay. (NLRB Closing Brief, May 11, 2011, page 2)

Respondent's Decision to Terminate Wallace on June 10, 2010.

Notwithstanding the self-serving statements by Marti and Craig Fredericks that they still hoped to salvage their working relationship with Wallace as of the morning of Friday, June 11, 2010 (Tr. 310, 389), it is clear that Respondent had made up its mind to terminate Wallace on Thursday, June 10, prior to any of the events of Friday, June 11. Castaneda admitted on the stand that the Fredericks told her on June 10 that they intended

to terminate Wallace. (Tr. **281-282).** Craig Fredericks further confirms that he and Marti told Castaneda on June **10** they were going to terminate Wallace. (Tr. **319-320).** In fact Respondent had prepared Wallace's final paycheck in order to hand it to him on Friday June **11.** (NLRB Closing Brief, May 11, 2011, page 13)

Prior to the **8:35** start time of the Friday staff meeting on June **11**, 2010, Wallace, with the help of Rachel May, distributed copies of his June **7/9** letter to the Board of Directors. (Tr. **51**, 349). There is no indication that any employees refused to accept copies of the letter. (Tr. 349).

II Although Wallace incorrectly used the term "whistleblower" in this letter, there is no evidence that as of the dates on which he wrote the letter that Wallace had reported any conduct of Respondent to any state or federal agencies (or indeed to any members of the public). (Tr. 50-5 1). (Citation page 13 & 14)

When the meeting began at **8:35** a.m., Castaneda announced that the employees would go to their individual house meetings first rather than all meet together as a group. (Tr. **52**, **87**, **350**). Wallace and Castaneda did not speak on the morning of June **11** before Castaneda instructed the employees to go to the rooms in which their particular house was meeting. (Tr. **52-53**, **87**). (NLRN CB May 11, 2011, page 13 & 14)

At approximately **8:50** a.m., and as confirmed **by** Desiree Coffee, Craig Fredericks stuck his head in the door of the room where Wallace and the other Heather House employees were meeting and summoned Wallace to a meeting in Marti Fredericks's office. (Tr. **53**, **88**). Because Wallace feared the possibility of being fired, he wanted a witness to accompany him to the meeting. (Tr. **54**). Coffee volunteered to serve as Wallace's witness, and the two of them began to head to Marti Fredericks' office. (Tr. **54**). At that point, Craig Fredericks told Coffee that she could not accompany Wallace as a witness. (Tr. **54**, **89**). Wallace then told Craig Fredericks that

he did not want to meet with Respondent without a witness. (Tr. 54). Marti Fredericks then intervened and said that Coffee could act as Wallace's witness. (Tr. 54). At some point between 8:50 a.m. and 9:00 a.m., upon Wallace's arrival at Marti's office, with Craig Fredericks, Margo Castaneda and Desiree Coffee present, Marti informed Wallace that his employment was being terminated. (Tr. 55, 392). When Wallace asked why he was being terminated, Marti said for insubordination. Coffee confirmed that Marti did not immediately say why Respondent was terminating Wallace. (Tr. 90). Wallace then repeatedly asked Marti to explain what specific allegedly insubordinate acts he had engaged in, but Marti did not respond. (Tr. 55, 90). Both Wallace and Coffee testified that Marti never provided any specifics. (Tr. 90). Thus, Wallace assumed that he was being terminated for speaking up at the meeting and sending letters. Thus, Wallace argued to Respondent that it had no lawful basis for terminating him. (Tr. 55). Coffee and Wallace testified that Wallace did not raise his voice at any time during the meeting in Marti's office. (Tr. 92). Marti Fredericks, however, told Wallace that he was no longer an employee and had to leave the premises. (Tr. 56). At about 9:00 a.m., Marti attempted to hand Wallace an envelope which purportedly contained Wallace's final paycheck and his termination letter, but Wallace refused to accept the envelope because he felt the termination was unlawful. (Tr. 59-60, 77; GC Exh. 7).

Wallace then left Marti's office, intending to go back to the Heather House room to retrieve his personal possessions and tell his Heather House co-workers that Respondent had terminated him. (Tr. **56**, **72**). As Wallace was walking from Marti's office back to the Heather House room, Craig Fredericks told Wallace that he needed to leave or Respondent would call the police. (Tr. **56**). Without ever stopping his stride

toward the Heather House conference room and away from Craig Fredericks, Wallace told Fredericks to go ahead and call the police. (Tr. **56**).**12** Wallace steadfastly denies that he ever motioned or gestured towards Craig Fredericks at any time while in Marti's office or in transit from Marti's office to the Heather House conference room. (Tr. **56-57**, **161**).

Nor did Desiree Coffee observe Wallace in any way physically threaten or challenge Craig in any manner. (Tr. **91-92**). (NLRB CB page 14-15)

The Citizen's Arrest of Wallace and Preparation of Police Report.

Wallace then went from the Heather House meeting room to the larger conference room where employees of several of Respondent's other houses were meeting. (Tr. 102-103, 224).

Wallace did not leave upon learning that Respondent had called the police because he did not want to be perceived as fleeing the scene of a crime. (Tr. **75-77**). (See also Tr. **176-177**).

Rachel May, who was meeting with her Saratoga House colleagues in this larger conference room, testified that Wallace did not yell or slam any door(s) as he came into the room, describing Wallace as calm but sad. (Tr. **355).** May further indicated that she did not perceive any of the employees present as being frightened of Wallace and never heard any employees later claim that they had been frightened of Wallace. (Tr. **356).** When a police officer from the Stockton Police Department asked Wallace if he would step into another room. (Tr. **103).** Wallace indicated that he preferred to stay in the room with the other employees present as witnesses, with which the police officer apparently acquiesced. (Tr. 104). When the police officer asked Wallace what was going on, Wallace initially directed the officer to the Respondent since it had been Respondent that had originally summoned the police. (Tr. 104).14

13 Even if Craig and Marti Fredericks are credited that the Heather House employees quickly left the room in which they had been meeting (Tr. 312, 393), there is no evidence that any employees left in the few minutes where Wallace was present prior to the arrival of Craig and/or Marti Fredericks. Moreover, Crump testified that Marti Fredericks and Castaneda showed up at the room and asked Crump to ask the employees to leave the room. (Tr. 223). Thus, any employees who left the room did so pursuant to the instruction of a supervisor rather than out of fear of Wallace. (Tr. 223, 312, 325, 444). (citation page 16)

Wallace informed the police officer about having spoken up at a staff meeting on behalf of other employees about working conditions, about having written a letter to Respondent's Board of Directors and having distributed it to co-workers, and having been assured by Crump that such conduct would not lead to Wallace's termination. (Tr. 178). Wallace told the officer he believed the termination had been unfair. (Tr. 104-105, 175-176, 178). While Wallace did not always directly answer the officer's questions about whether Wallace intended to leave, Wallace never told the officer that he refused to leave. (Tr. 105). Eventually, the police officer pulled out a billy club or baton and asked Wallace to stand up. (Tr. 105). As Wallace was standing up, Wallace said that the baton would not be necessary. (Tr. 105). The officer then took out his handcuffs and handcuffed Wallace. (Tr. 105). There is no evidence whatsoever that Wallace resisted being cuffed in any respect or that the officer kept his baton out for more than a few seconds if it even fully came out of its holster. (Tr. 178-179, 355, 394). Wallace and the officer then went outside to where the police car was parked.

Once outside, the officer told Wallace that he could go to his car and leave right then. (Tr. **107).** However, Wallace told the officer that having been handcuffed and removed from the premises, he felt as if he had already been detained and had lost his civil rights, such that it would be appropriate for the officer to go ahead and arrest him. (Tr. **107).**15

14 It appears likely that the police officer spoke to the Fredericks before speaking to Wallace. (Tr. **313**-314). It is clear from the record that both Marti and Craig Fredericks did speak with the police officer

(Tr. 313-314, **393-394**), and that the Fredericks had a full opportunity to tell the police anything they deemed pertinent about the situation. (Tr. 422). **15** Although Respondent's counsel expressed incredulity at Wallace failing to leave when the police officer gave Wallace the option of leaving (Tr. **108**), Wallace's conduct (as explained at Tr. **108**) is consistent with both his original failure to leave after first learning that the police had been called and his later resistance to having the criminal trespass charge against him dropped when he made his first court appearance. (Tr. **176-177**). Believing that the entire process was unlawful from the outset, Wallace wanted the opportunity to explain himself to anyone who might listen and to see the process through until its end. **16** Wallace did not return to the interior of Respondent's premises at any time that day. (Tr. **179**). Wallace merely, with the consent of the police, returned after his release from the police station to retrieve his personal vehicle in Respondent's parking lot. (Tr. **179**). (Citation page(s) 17 & 18)

The officer then renewed his offer to release Wallace and asked Wallace if he would return to Respondent's premises if released. While Wallace told the officer that he could not guarantee that he would not return (Tr. **107-108**), he never told any of Respondent's managers or supervisors that he intended to return to Respondent's facility. (Tr. **179).16**

Wallace was originally taken to the County Jail. (Tr. I 10). However, since he was being cooperative and calm, a jail representative determined that Wallace should be booked and otherwise processed at the police station rather than the jail. (Tr. 110). Wallace was subject to a citizen's arrest. According to the police report, Marti Fredericks requested that Wallace be arrested. (See Resp. Exh. 1; Tr. 108, 183-184, 336). The police report does not mention any accusation that Wallace made any threatening motion or gesture towards Craig Fredericks. (Resp. Exh. 1; Tr. 323). Similarly, the police report makes no mention of Wallace allegedly threatening to return to Respondent's premises if released from police custody. Marti Fredericks admits that she never heard Wallace say that he would return to Respondent's premises if released from police custody, and Craig Fredericks admits that he did not hear any of Wallace's conversations with the police officer. (Tr. 314, 424). (NLRB Closing Brief, May 11, 2011, page(s) 16-18)
Respondent's Post-Termination Attempts to Dig Up Dirt about Wallace.
On June 14, 2010, Respondent through Marti Fredericks filed with the San

Joaquin County Superior Court a "Request for Orders to Stop Harassment". (Resp. Exh. 2; Tr. 115). As set forth in the application, the alleged basis for the need for a restraining order was that Wallace had been terminated on June 11 and had "refused to leave the premises" and "threatened re-entry." On August 17, 2010, the San Joaquin County Superior Court entered an "Amended Restraining Order After Hearing to Stop Harassment". (Resp. Exh. 3; Tr. 115-116). Wallace says that he was never served with the application for a restraining order or the actual restraining order. (Tr. 112-114). While Respondent's counsel asserted that a proof of service was on file with the San Joaquin County Superior Court (Tr. 112-113), such proof or proofs of service was/were not put into evidence by Respondent and are not attached to Respondent Exhibits 2 or 3. Accordingly, Wallace did not become aware of the terms of the restraining order against him until he received it as part of paperwork received from the California Department of Industrial Relations, Division of Labor Standards Enforcement (the "Labor Commissioner"), which was not until August or possibly September 2010. (Tr. 113 -114). Consistent with his not being served, Wallace did not appear for any hearings in June, July or August in San Joaquin County Superior Court at which any restraining orders were argued, considered or granted. (Tr. 113). The charge of trespass against Wallace was ultimately dropped, and the Court

The charge of trespass against Wallace was ultimately dropped, and the Court made a finding of factual innocence as to Wallace. (Tr. 191). (NLRB CB page(s) 20-21) More than three months after Wallace's termination, and more than six weeks after Wallace had filed his unfair labor practice charge, counsel for Respondent on September 28 and October 1, 2010 made a California Public Records Act request seeking documents from the Community Care Licensing (CCL) Division of the California

Department of Social Services relating to Wallace and Blue Mountain Wilderness. (Resp. Exh. 6; GC Exh. I (a)). Although it appears that counsel for Respondent received the responsive records on October 12, 2010, there was testimony from Marti Fredericks that counsel did not turn over such records to Respondent until on or about December 23, 2010. (Tr. **376-377**, 405). (NLRB Closing Brief, May 11, 2011, page(s) 21) Initially, Respondent's witnesses should not be credited with respect to their exaggerations of the remarks made by Wallace at the May 28, 2010 staff meeting. Wallace steadfastly denies that he called the Fredericks cheats, thieves or liars, that he accused the Fredericks of lining their pockets, or that he asserted the existence of any collusion between Respondent and its auditors and/or accountants. (Tr. 443).25 Respondent did not produce any non-supervisory witnesses for the purpose of corroborating that Wallace made any such remarks, and, tellingly, Respondent did not ask its own witness Kay Tiffany about any of Wallace's alleged statements at the May 28, 2010 meeting at which she was present.26 There is no evidence that Wallace used any profanities or epithets during the meeting.27 (NLRB Closing Brief, may 11, 2011, page(s) 30)

26 It is therefore appropriate to draw the inference that Ms. Tiffany's testimony would have been supportive of Wallace's recollection rather than that of Respondent witnesses such as Craig Fredericks. 27 The February 17, 2011 decision of the California Unemployment Insurance Appeals Board (Resp. Exh.5) should be given no weight by the Board because the decision was not based on percipient witness testimony. (Tr. 430). It is undisputed that Wallace did not appear at the October 15, 2010 telephonic hearing before California Unemployment Insurance Appeals Board Administrative Law Judge Mildred Bruns, It is also undisputed that the only two witnesses to testify before Judge Bruns were Administrator Marti Fredericks and Assistant Administrator Lauri Tribbey (Tr. 129, 425-430), even though Tribbey did not attend any of the key Friday staff meetings on May 28, June 4 or June 11, 2010 and was never in any position to observe Wallace's work (Tr. 427), and even though Marti Fredericks was not present for much of the May 28, 2010 staff meeting interaction between Wallace and Craig Fredericks or for any of the June 4,2010 staff meeting. (Tr.228,428-430). To the extent that ALJ Bruns' decision is given any weight, the decision ironically reinforces the protected and concerted nature of Wallace's activities when it notes "[b]egining with the all staff meeting on May 28, 2010, the claimant was disruptive during the meeting/training session by insisting on discussing financial or wage-related issues in an attempt to incite his co-workers to take action against the Employer." (Resp. Exh. 5). (Citation page 31)

At the hearing, Wallace credibly testified that he did not call Craig Fredericks a liar, or call the Fredericks thieves or cheats. (Tr. 443). To the extent that Wallace may have said "that's not true" in response to Craig Fredericks's contentions with respect to the Employer's inability to pay raises immediately, or to the extent that Wallace brought up issues other than wages, such conduct falls far short of the standard for finding conduct to be unprotected. See Media General Operations, Inc. d1bla Winston-Salem Journal, 341 NLRB 124, 125 (2004), enforcement denied, 394 F.3d 207 (4th Cir. 2005) (during crew meeting discussion of performance, employee's protected repetition of point raised by other employees did not lose Act's protection even though employee, unprovoked by any violations, called supervisor a racist and accused company of being racist place to work). Wallace simply did not use the types of obscene epithets with respect to Craig Fredericks that have caused employees in other cases to lose protection of the Act. Far more insulting or profane speeches have been found to be protected. See Neff-Perkins Company, 315 NLRB 1229, 1233 (1994) (employee told supervisor to shut up sit down, and made profane comments such as "shitty"); Caval Tool Division, Chromalloy Gas Turbine Corporation, 331 NLRB 858, 863 (2000) (employee argumentative and confrontational and according to company "disparaged company officials in front of other employees" and made official "look like a fool"); CKS Tool & Engineering, Inc. of Bad Axe, 332 NLRB 1578, 1586 (2000) (employee who interrupted boss at meeting to say "don't you think we give a fuck about our work? Are you saying, Tom, we don't give a fuck about our jobs?" and "God damn it, don't you think we are human beings?" found protected); *United Enviro, Systems, Inc.*, **301** NLRB 942, 943

(1991) (employee's outburst that "the god-damn paperwork is a pain in the ass" and "I don't have the fucking time for it" found protected); F W. Woolworth Company, 251

NLRB 1111, 1112-1113 (1980) (Board found conduct protected despite fact that employee repeatedly and loudly insisted on speaking during group meeting, contrary to employer's policy prohibiting such, and in contravention of direct order to cease interrupting by the speaker, the highest ranking manager in the plant). (NLRB Closing Brief page(s) 33-34)

Moreover, even if the Board were to find that Wallace had called Craig Fredericks a liar, this still would not remove Wallace's conduct from the protection of the Act. See Stanford New York, LLC d1bla Stanford Hotel, 344 NLRB 558, 559 (2005) (protected conduct where employee called boss a liar and "f-ing son of a bitch"); *Union Carbide* Corporation, 331 NLRB 356, 360 (2000) (employee calling supervisor "a fucking liar" found to be protected); Severance Tool Industries, Inc., 301 NLRB 1166, 1170 (1991) (employee who called employer president a son of a bitch and threatened to discredit president's personal reputation, which employer found insubordinate, disrespectful and belligerent, found to be protected). (NLRB Closing Brief, May 11, 2011, page 34) Wallace's Conduct is Also Protected *Under Atlantic Steel* Counsel for the Acting General Counsel submits that it is not necessary to apply the factors set forth in Atlantic Steel Company, 245 NLRB 814 (1979) in order to determine that Wallace's conduct remained protected in this case. Indeed, many of the cases cited above found employee conduct to be protected without application of the Atlantic Steel factors. See, e.g., Dickens, Inc., 352 NLRB 667 (2008); Grimmway Farms, 315 NLRB 1276 (1995); Union Carbide Corporation, 331 NLRB 356 (2000); Honda of America Manufacturing, Inc., 334 NLRB

751 (2001); United Enviro Systems, Inc., 301 NLRB 942 (1991); CKS Tool &

Engineering, Inc. of BadAxe, **332** NLR.B **1578** (2000).32 9 (NLRB Closing Brief 06/11/11 page 36)

However, in the event that the Administrative Law Judge concludes it is necessary to apply the *Atlantic Steel* factors in this case, Counsel for the Acting General Counsel submits that Wallace's conduct should be found to be protected under that standard. Pursuant to *Atlantic Steel*, whether the Act's protection is lost depends upon a balancing of four factors: (1) the place of the discussion between the Employer and the employee; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked **by** an employer's unfair labor practice. *Atlantic Steel Company*, 245 NLRB 814 (1979). (NLRB Closing Brief 06/11/11 pg. 37)

Regarding the first factor, this factor at most weighs only slightly against

Wallace's conduct being protected. See *Stanford New York, LLC d/bla Stanford Hotel,*344 NLRB **558 (2005)** (factor weighs in favor of protection where employee outburst occurs when no other employees are present, thus minimizing potential that outburst will impair discipline in the workforce); *Jackson Hospital Corporation d/bla Kentucky River Medical Center,* **355** NLRB No. **129,** slip op. at **29** (2010).33 The import of this factor is strongly mitigated **by** the fact that it was Respondent who chose to announce the wage plans in front of all of the employees, and then solicit employee comments. Thus, it was Respondent and not Wallace that essentially chose the location and circumstances of the JMay **28,** 2010 encounter. See *Noble Metal Processing, Inc.,* 346 NLRB **795, 796 (2006)** (NLRB Closing Brief, May 11, 2011, page 37)

³³ Although Respondent attempts to exaggerate the alleged disruption caused by Wallace's meeting conduct, it is clear that Wallace's conduct did not prevent Respondent from carrying out its Friday staff meetings. The cross examination of Respondent's witnesses and documentary evidence established that only one of the three pertinent dates (June 4, 2010) contained a formal staff training, and that Respondent was not prevented from completing its training by Wallace's conduct. Further, to the extent that Margo

Castaneda's June 8 warning letter (GC Exh. 6) asserted that Wallace's distribution of his June I letter to the Board of Directors at the June 4 staff meeting caused "animosity amongst some staff," that contention was readily disproven by Rachel May's testimony that many employees at the June 4 staff meeting agreed with the sentiments set forth in Wallace's June I letter (Tr. 343-345), as well as by the fact that no employees refused to accept a copy of Wallace's letter. (Tr. 41). Indeed the only evidence of "animosity amongst staff' at the June 4 meeting was the evidence that two employees (Wanda Billsbury and Waynesha Fultcher) agreed with Castaneda's 8(a)(1) threat that any unhappy employees should find work elsewhere. (citation page 33)

(Chairman Battista, concurring) (employee meeting an appropriate forum in which employees could reasonably be expected to express their views regarding conditions of work). The second factor, the subject matter of the discussion, strongly favors Wallace's conduct being found protected. The Board considers the subject matter to weigh in favor of the conduct not losing protection when the subject matter of the discussion is protected in nature. Where the actor's conduct occurs in the context of the attempted assertion of a fundamental right under the Act, such as the right to concertedly discuss wages, this factor weighs strongly in favor of protection. Stanford Hotel, 344 NLRB at 559. Thus, given that Wallace's comments at the May 28, 2010 staff meeting as followed up by his letters raised fundamental issues with respect to terms and conditions of employment such as wages, raises, the need to inspect Respondent's financial records in order to verify its alleged inability to grant raises, the impact on employees of understaffing, mandates the conclusion that the second factor strongly supports a finding that Wallace's conduct was protected. Turning to the third factor, the nature of the employee's outburst, this factor also strongly supports a finding that Wallace's conduct was protected. In *Noble* Metal Processing, Inc., 346 NLRB No. 78 (2006) the Board found that employee Dowell did not lose protection of the Act when, in a meeting with a manager, Dowell told other employees that they did not have to listen to the manager because the manager's announced changes were unilateral and illegal, and got up as if to leave. As noted above there is no evidence or contention that Wallace used any profanities at any time during

the May 28, 2010 staff meeting.34 With respect to the fourth factor, whether the outburst was, in any way, provoked by an employer's unfair labor practice, there is no contention under current Board law that an unfair labor practice provoked Wallace to speak up at the May 28, 2010 staff meeting. However, Counsel for the Acting General Counsel submits that on balance, with the second and third factors strongly favoring a finding that Wallace's conduct was protected and the first factor only slightly favoring Respondent given Respondent's voluntary decision to make its wage announcement at a meeting attended by all employees, the Board would be warranted in finding Wallace's conduct leading up to his termination to be protected under Atlantic Steel. (NLRB Closing Brief, May 11, 2011, page(s) 38-39)

Respondent Violated Section 8(a)(1) of the Act by Terminating Wallace Under Wright Line, as Respondent's Shifting Defenses Fail to Overcome the Prima Facie Case Counsel for the Acting General Counsel initially notes that the Board need not apply *Wright Line* in this case. See *Neff-Perkins Company*, 315 NLRB 1229 n. 2 (1994) (when Board finds that conduct for which employer claims to have discharged employees was protected concerted activity, and rejects employer's defense that employee conduct exceeded the protection of the Act, *Wright Line* need not be applied); *Valley Hospital Medical Center*, 351 NLRB No. 88, slip op. at 3 n. 5 (2007) (Wright Line applies where the motive for a challenged employment action is in dispute; where there was no dispute

that employee Wells was discharged for making statements regarding cuts to staff leading to insufficient care for patients and the employer having more than enough money to pay

³⁴ That Craig Fredericks may have found it embarrassing to be challenged in front of his employees by Wallace does not render Wallace's conduct unprotected. See Kroger Company d1bla Brunswick Food and Drug, 284 NLRB 663 (1987). In that case, an employee's conduct was found to be protected when, after an employer supervisor unlawfully interfered with her ability to meet with a union representative, the employee jumped up, paced around, and said to the employer's customers in the presence of the supervisor that she would "like to apologize for the ignorance of management." 39 (citation page 39)

for more staff, the sole issue was whether Wells enjoyed the Act's protection in making such statements); Felix Industries, 331 NLRB 144, 146 (2000). Thus, where, as here, an employee is discharged for conduct that is part of the res gestae of protected concerted activities, the only issue is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for further service. Dickens, Inc., 352 NLRB 667, 672 (2008); Caval Tool Division, Chromalloy Gas Turbine Corporation, 331 NLRB 858, 863 (2000); Consumers Power Company, 282 NLRB at 132; Firch Baking Company, 232 NLRB 772 (1977). (NLRB Closing Brief, May 11, 2011, page(s) 39-41)

For reasons explained above, Counsel for the Acting General Counsel submits that the evidence overwhelmingly demonstrates that Wallace's conduct up to the time of his termination was not so egregious as to render Wallace unfit for further service. However, in the event that the Board accepts Respondent's argument that any of Wallace's conduct was unprotected, it is evident that the unfair labor practice is nevertheless established. Despite our position that the *Wright Line* analysis need not be applied in this case, it is evident that a violation may be established under *Wright Line as* well. Counsel for the Acting General Counsel has carried its burden of proving that Wallace's participation in protected concerted activities was a substantial motivating factor in the decision to terminate him, and Respondent has failed to meet its burden of demonstrating that it would have discharged Wallace regardless of his participation in protected concerted activities. Under *Wright Line*, the General Counsel meets his evidentiary burden by establishing that: (1) the employee engaged in protected activity; 2) the employer knew of that activity; and (3) the employer demonstrated animus toward

protected activity. *Corrections Corporation of America*, 347 NLRB **632**, 634 **(2006)**. Once that burden has been met, the Respondent's burden is not merely to prove that it could have terminated Wallace for some nondiscriminatory reason but that it actually would have done so. *Yellow Ambulance Service*, 342 NLRB 804, **805** (2004). (NLRB Closing Brief, May 11, 2011, page(s) 40-41)

In particular, Respondent's lack of clarity and consistency regarding the manner in which Respondent has explained its reasons for Wallace's termination is an important factor in evaluating Respondent's proffered justifications. The Board has long expressed the view that when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted. *Black Entertainment Television*, 324 NLRB 1161 (1997); *Citizen's Investment Services Corporation*, 342 NLRB 316, 331 (2004). The rationale for this principle is that when an employer is unable to maintain a consistent explanation but rather resorts to shifting defenses, it raises the inference that the employer is "grasping for reasons" to justify an unlawful discharge. *Citizen's Investment Services Corporation*, 342 NLRB at 331 (citing *Meaden Screw Products Company*, 336 NLRB 298, 302 (2001)).

For example, Margo Castaneda testified that Wallace was terminated for insubordination consisting of derogatory comments towards Respondent and towards the Fredericks at the May 28 staff meeting. (Th 253). Castaneda needed to be led by Respondent's counsel in order to add Wallace's alleged failure to attend the June 7, 2010 meeting with Crump and Castaneda as yet another reason for the termination. (Tr. 253).35

Further, Castaneda's testimony suggested that if Wallace had simply addressed his June 1, 2010 Board of Directors letter to the staff as well, it might not have

constituted insubordination warranting discipline (Tr. 271-272), yet Craig Fredericks then testified that it was the contents of Wallace's letter (rather than the fact it was not also addressed to staff) that rendered it an element of Wallace's alleged insubordination. (Tr. **333-334).** And while Craig Fredericks was testifying that it was the contents of Wallace's letters that constituted insubordination (Tr. 333-334), Marti Fredericks claims this wasn't a basis. See Tr. 389 ("we didn't care that he did the - you know - write letters and talk to staff."). Similarly, while Marti Fredericks testified that Castaneda told Marti that Wallace at the June 4 meeting had made derogatory statements such as the Fredericks are liars and cheaters, Crump confirmed his affidavit testimony that Wallace hardly spoke at the June 4 meeting. (Tr. 408, 42, 233). Then, both the contents of the letters and their distribution become beside the point, when Marti Fredericks instead informs Castaneda that "it was okay for him to write letters but it was not okay for him to act the way he was acting." (Tr. 419). Conversely, the June 8 written warning from Castaneda says that it was inappropriate for Wallace to circulate his June 1 letter. In addition to the shifting reasons, there is also the factor of timing. It is important to note that Wallace was fired only two weeks after first speaking up in a staff meeting with respect to Respondent's failure to pay higher wages to its employees. A discharge or other adverse action shortly after an employee engages in protected activity supports an inference of discriminatory motivation. State Plaza, Inc., 347 NLRB 755,

757-758 (2006); *Campbell Electric Company,* 340 NLRB **825,** 841-842 **(2003).** (NLRB Closing Brief, May 11, 2011, page(s) 41-42)

35 It is also noteworthy the extent to which Respondent's counsel had to lead Marti Fredericks in the course of setting forth her alleged reasons for Wallace's termination. (Tr. 386-387). (Citation page 42)

In contrast to Respondent's wavering justifications for Wallace's termination and evolving definition of insubordination, Respondent's animus towards protected concerted

activities comes through loud and clear. Throughout the testimony of Grover Crump, Cramp repeatedly expresses opinions that indicate that he believes that protected concerted activities are not appropriate because such staff meetings are not the proper time or place for someone like Wallace to speak up about wages. (See Tr. 217-218, 234-235),36 Crump's description of Respondent's desired approach (Tr. 234), in which one must first privately go to his/her supervisor and then go to "the Labor Board" but refrain from raising problems at Friday staff meetings, would extinguish the possibility of any protected and concerted activities such as those engaged in by Wallace in this case. Similarly, despite her efforts to sidestep the conclusion, it is clear that what Castaneda found insubordinate was Wallace raising wage and raise issues in the presence of other employees rather than first approaching a supervisor individually and privately. (Tr. 266-**269).** Finally, it is clear that Marti Fredericks places a higher value on "chain of command" than on the sanctity of protected concerted activities.38 As Marti succinctly put it, "if he had a problem, he should have come and talked to me." (Tr. 411). In sum, the evidence of Respondent's antipathy towards protected concerted activities is overwhelming.39 (NLRB Closing Brief, May 11, 2011, page 43)

36 Interestingly, Crump's statement about Wallace to the effect of "you know, he's only been there a few months and he's already gathered all this information" tends to tacitly suggest that Crump found it threatening that a newer employee such as Wallace was making efforts to be better informed about Respondent's operations. (Tr. 219). 37 Castaneda's attempt to soften the impact of Respondent's position by claiming that it would have been appropriate if Wallace had asked for time at a Board of Directors meeting to discuss the issues raised by Wallace at the May 28, 20 10 staff meeting rings hollow. (Tr. 252-253). By writing his June I letter to the Board of Directors, Wallace essentially left the Board of Directors the option of responding to Wallace in writing or inviting Wallace to come to a meeting to further discuss such issues. 38 When asked "it is the Employer's position, isn't it, that an employee should not be able to bring up something in a letter to the Board of Directors unless he or she has first brought it up to management's attention on an individual basis, right?", Marti Fredericks said "I think that's the general chain of command." (Tr. 410). (Citation page 43)

³⁹ While Respondent, like many employers, professes to have an "open door, policy, it is nevertheless clear that employees are afraid to speak up to management, particularly on an individual basis, as testified to **by** current employee Rachel May. (Tr. 362, 384). Tellingly, Respondent was unable to point to a single instance where any employee has actually utilized Respondent's alleged grievance procedure. (Citation page 44)

In short, given the way in which Wallace stood up in a meeting of all employees and what he said, there can be no dispute that Wallace engaged in protected concerted activities and that Respondent had knowledge of such activities. Respondent's animus towards Wallace's protected concerted activities and toward Wallace personally is demonstrated by its trial testimony and affidavit excerpts discussed at trial. Finally, given its shifting defenses, Respondent has not shown and cannot show that it not only could have but would have discharged Wallace in the absence of his protected concerted activities. (NLRB Closing Brief, may 11, 2011, page 45)

Respondent Violated Section 8(a)(1) of the Act by Issuing the June 8,

2011 Written Warning to Wallace On June 14, 2010, Wallace received the June 8 written warning letter drafted by Program Director Margo Castaneda. GC Exh. 6. There is no evidence that Wallace knew he was being formally disciplined via written warning until he received the warning on June 14, 2010, three days after his termination. Notably, Castaneda did not tell Wallace at the June 4 meeting that there was anything unlawful or inappropriate in Wallace having sent his letter to the Board of Directors or his having distributed copies of it to employees. (Tr. 44). Nor did Castaneda inform Wallace that he was required to raise such issues by utilizing Respondent's grievance procedure. (Tr. 45). The June 8 warning letter contains two particularly important passages: (1) "On Friday, June 4, 2010, your direct supervisor, Mr. Cramp, and his direct supervisor, Margo Castaneda, Program Director, requested to meet with you on Monday, June 7, 2010. You refused to meet with us stating this is a matter with the Board of Directors." 40 (2) "The purpose of the meeting was to address that it was inappropriate for you to circulate your letter during the all staff Friday training meeting which caused disruption and what

appeared to be animosity amongst some staff. Your letter was addressed to the Board of Directors, Grover Crump and Margo Castaneda and at that time did not involve other staff members." 41 As both the testimony of Wallace and the contents of the June 1, 2010 letter to the Board of Directors make clear, the preparation and dissemination of Wallace's letter were in furtherance of the protected and concerted activities which had already begun at the May 28, 2010 staff meeting. Furthermore, Wallace testified and Crump confirmed that Crump never told Wallace that the June 7 meeting was mandatory or that Wallace faced the prospect of any discipline if he failed to attend. There is no credible evidence that Crump or any other Respondent representative made any effort to persuade Wallace to reconsider his reluctance to attend, or put him on notice that he could be disciplined if he failed to attend. Thus, it is evident that Wallace's "failure" to attend the meeting is merely a pretext for his termination. (NLRB Closing Brief, May 11, 2011, page(s) 45-46)

40 To the extent that this passage can be read as suggesting that Castaneda ever directly asked Wallace to attend any meeting on June 7, 2010, it is inaccurate. The undisputed evidence shows that only Crump ever spoke with Wallace about the possibility of meeting on June 7, with no evidence that Castaneda spoke with Wallace even after Crump communicated Wallace's unwillingness to meet to Castaneda.

41 Margo Castaneda, the author of the warning letter, was quite unclear as to the alleged basis for the written warning. Castaneda initially testified that Wallace was not reprimanded for writing the June 1,2010 letter to the Board of Directors but rather because of the "uproar" caused by the distribution of the letter at the June 4 meeting. (Tr. 274). However, cross-examination of Castaneda and other witnesses brought out not only that Wallace hardly spoke at the June 4 meeting but that Respondent was able to complete its training and meeting on June 4 notwithstanding any alleged "uproar". (Tr. 277-279). Indeed, given the complete absence of evidence of any employees in the June 4 meeting expressing substantive disagreement with any of the contentions made in Wallace's June 1, 20 10 letter, what little "uproar" that occurred appeared to be the two employees who agreed with Castaneda's unlawful threat that employees who were not happy should be looking for work elsewhere. (Citation page 46)

In addition, based on Respondent's actions leading up to the June 7 meeting,

Wallace was privileged to refuse to attend the meeting. Among other things, it made no
sense to call Wallace to a meeting when Castaneda had already referred the matter to
Respondent's Board of Directors earlier the same day. Thus, Wallace perceived no
legitimate basis for meeting individually with Castaneda and Crump when he expected a

written response from Respondent's Board of Directors shortly. *Millcraft*

Furniture Company, Inc., **282** NLRB **593** (**1987**) is illustrative of the point. (NLRB Closing Brief, May 11, 2011, page(s) 47-48)

Similarly, in *Grimmwa Enterprises, Inc.*, **315** NLRB **1276** (1995), (NLRB Closing Brief, May 11, 2011, page 48)

Respondent Has Failed to Establish that Wallace Engaged in Post: Termination Misconduct that Renders Him Entirely Unfit for Further Service.

In Stephens Media, LLC d/bla Hawaii Tribune-Herald, 356 NLRB No. 63 (2011), the Board recently clarified the standard for evaluating an employer's contention that it should be excused from an obligation to reinstate and pay back pay because of post discharge misconduct. The Board made clear that an employer in such a position has a heavier burden than when it is merely seeking to justify the original discrimination. 356 NLRB No. 63, slip op. at 2. The employer in such a case has the burden of proving misconduct so flagrant as to render the employee unfit for further service or a threat to efficiency in the plant. Id. (citing O'Daniel Oldsmobile, Inc., 179 NLRB 398, 405 (1969)). 49 (NLRB Closing Brief, May 11, 2011, page 49)

Based on the evidence developed at the hearing, it may be presumed that Respondent will be arguing in its brief that the post-discharge misconduct which should preclude the reinstatement of Wallace consists of any or all of the following: (a) Wallace's refusal to immediately leave Respondent's premises after being terminated; (b) Wallace's alleged gesture or motion suggesting a willingness to engage in a physical altercation with CFO Craig Fredericks; (c) Wallace's alleged statement of an intent to return to the Employer's premises if released from police custody; (d) Respondent's obtaining of a restraining order against Wallace; and (e) Wallace's encounter with Respondent bookkeeper Kay

Tiffany in a post office parking lot in November **2010.** For the reasons stated below, none of these ostensible justifications offered **by** Respondent withstand scrutiny. Some are not supported **by** credible evidence (i.e., Wallace's alleged gesture to Craig Fredericks, and Wallace's alleged announcement of an intent to return to Respondent's premises). Others, even if established, simply do not render Wallace "unfit for further service" as Board law requires. (NLRB Closing Brief, May 11, 2011, page 50)

Wallace's Alleged Threatening Gesture to Craig Fredericks Did Not Render Him Unfit for Further Service As previously noted, Wallace steadfastly denies that he made any sort of threatening gesture or motion towards Craig Fredericks as Wallace was leaving Marti Fredericks' office after having been terminated. (Tr. 56-57, 161). Even though the police officer spoke to both Craig and Marti Fredericks, there is no mention in the police report (Resp. Exh. 1) of Wallace having threatened or gestured at Craig Fredericks in any manner. There is similarly no mention of Wallace having threatened or gestured at Craig Fredericks in the application for a temporary restraining order which Respondent counsel and Marti Fredericks signed and dated on June 11, 2010, the same date as the alleged threatening gesture was made. Resp. Exh. 2. Finally, Respondent did not produce as a witness the administrative assistant to whom Craig purportedly stated "I'm not going to be threatened this way" remark immediately after Wallace's alleged threatening gesture. (Tr. 331).43

It is therefore readily apparent that Respondent <u>simply concocted this story</u> about Wallace's threatening gesture, and that it is nothing more than one more part of Respondent's effort to develop and pile on post hoc justifications for its original unlawful decision to terminate Wallace. Finally, even if Wallace is found to have made a

threatening gesture at Craig Fredericks, this is not enough to render his conduct unprotected and render Wallace unfit for further service. Post-discharge threats, challenges to fight and other verbal misconduct are not normally considered sufficiently serious to render the employee unsuitable for future employment. *Trustees of Boston University*, 224 NLRB 13 85, 1409 (1976); Multi-Hydromatic Welding and Manufacturing Company, 113 NLRB 755, 756 (1955); National Furniture

Manufacturing Company, Inc., 134 NLRB 834, 835-836. (NLRB Closing Brief, May 11, 2011, page(s) 51-52)

43 <u>It is also pertinent that Respondent did not elicit any testimony from Margo Castaneda as to having observed Wallace make any threatening motion or gesture. Nor did Marti Fredericks or Castaneda corroborate Craig as having said "I'm not going to be threatened this way." (See Tr. 393). (citation page 52)</u>

The Restraining Order Against Wallace Does Not Render Him Unfit for
Further Service *In Champion Home Builders Company*, 343 NLRB **671** (2004), the
Employer obtained a three year temporary restraining order against former employee
Ramon Rivas from the Tulare County Superior Court on or about January **7**, **1999**. 343
NLRB at **671** n. **6**. On May **16**, 2000, a Board administrative law judge found that Rivas
had been unlawfully terminated in retaliation for his protected concerted activities, and
issued a recommended order requiring Rivas' reinstatement and requiring the employer to
withdraw its state court lawsuit against Rivas in which it had obtained the three-year
restraining order. On November **19**, 2004, the Board issued its decision in *Champion Home Builders Company*, 343 NLRB **671** (2004) in which it upheld the ALJ's
determination that the employer had violated Section 8(a)(1) of the Act **by** discharging
Rivas, but reversed the ALPs determination that the employer had violated 8(a)(1) **by**failing and refusing to stay or seek dissolution of the restraining order against Rivas upon
issuance of complaint against the employer. 343 NLRB at **672**. However, at the end of

its opinion, the Board noted as follows: "the better approach is to allow the restraining order to coexist with the unfair labor practice complaint, and to find preemption only at the point the Board issues an order containing a remedy that conflicts with the State court lawsuit. However, we acknowledge that our remedy requiring the Respondent to reinstate Rivas conflicts with the part of the restraining order prohibiting Rivas from entering the Respondent's property and contacting employees during working hours. Thus, as part of the remedy for Rivas's unlawful discharge, we order the Respondent to petition the court to withdraw those portions of its restraining order." 343 NLRB at 673. On appeal of the Board's decision by all interested parties, on December 4, 2006, the U.S. Court of Appeals for the Ninth Circuit determined that substantial evidence supported the Board's finding that reinstatement of Rivas was appropriate. Carpenters Union Local 1109 v. NLRB, 209 Fed. Appx. 692, 2006 WL 3487113 (9th Cir. 2006). The Ninth Circuit granted the union's petition seeking to reverse the Board's ruling that the employer's restraining order was not preempted until the remedial order was entered by the Board, finding that the preemption occurred as of the date on which the NLRB complaint issued.

On remand, on July 23, 2007, the Board issued its decision in *Champion Home*Builders Company, 350 NLRB 289 (2007). In its decision, the Board accepted the Ninth Circuit's decision with respect to the TRO being preempted as of the moment of complaint rather than the moment of a Board order only as "the law of the case." 45

Because the Board only accepted the Ninth Circuit's determination as the law of the case, and not as a controlling principle to be applied in future cases involving different parties and different facts, it is evident that the Board continues to follow the principle from the

original Board decision in *Champion Home Builders Company* that preemption occurs only at the time of a Board decision. With these principles in mind, it is evident that an order from the Administrative Law Judge calling for reinstatement of Wallace is appropriate. If the Administrative Law Judge issues such a recommended order requiring the reinstatement of Wallace, and if the Board enforces that order before the TRO expires **by** its own terms on July 12, **2013**,

Respondent will then be faced with the issue of whether it will voluntarily agree to dissolve or modify the TRO so that Wallace may return to work. In the event that Respondent refuses to seek dissolution or modification of the TRO at that point, Wallace could then file a new charge, and the Region could issue a new complaint, alleging that the maintenance of the TRO at that point in the face of a final Board order requiring reinstatement is a separate unfair labor practice Accordingly, there is nothing preventing the Administrative Law Judge from issuing a recommended order calling for the reinstatement of Wallace, and the existence of the TRO does not render Wallace unfit for further service.46 (NLRB Closing Brief, May 11, 2011, page(s) 54-56) The November 16, 2010 discussion between Wallace and Kay Tiffany in the post office parking lot falls significantly short of meeting the stringent "unfit for further service" standard. See O'Daniel Oldsmobile, Inc., 179 NLRB 398, 405 (1969) (discriminatorily discharged employees did not forfeit reinstatement by expressions of resentment occasioned by their discharge, which included threats of violence against other employees or management representatives). Wallace expressed regret for the incident and explained that it flowed from Wallace's disappointment over having been fired for protected and concerted activities and his belief that Tiffany had falsely

confirmed Craig Fredericks's statements about Respondent's inability to pay immediate raises. In any event, there is no contention that Wallace made any threats during the incident, and there is little to no chance that such an episode will ever be repeated, which is indeed what Tiffany herself confirmed to the state court judge who opted not to issue a restraining/harassment order against Wallace after the November 2010 incident. Wallace's conduct falls squarely within that found by the Board to not preclude reinstatement. In JCO Food Corporation dlbla C-Town, 281 NLRB 458 (1986), for example, discharged employee Perez (a Puerto Rican) came by the employer's plant to pick up her last paycheck, at which time she observed the Dominican employee who had replaced Perez. The Employer' president was Dominican as well. In the presence of the Dominican replacement and another employee, Perez commented that she (Perez) was a Puerto Rican and not a "shit Dominican". The Board, noting that Perez's outburst was not accompanied by threats or violence, and stating that it did not condone Perez's remark, nevertheless found that the conduct by Perez was not of such a flagrant or serious nature as to warrant withholding reinstatement. 281 NLRB at 458. See also Blue Jeans Corporation, 170 NLRB 1425 (1968) (no forfeiture when emotionally distressed discriminatee chased and threatened to kill a supervisor with scissors after discharge); Systems with Reliability, 322 NLRB 757, 760-761 (1996) (no forfeiture when discriminatee called supervisor a bald-headed asshole after supervisor threatened to call the police). Here, importantly, there is no evidence that Wallace ever touched or made an attempt to touch Tiffany. See Carthage Fabrics Corporation, 101 NLRB 541, 553-555 (1952) (reinstatement forfeited when discriminate hit supervisor in face with fist at time of discharge); Family Nursing Home & Rehabilitation Center, 295 NLRB 923 (1989)

(reinstatement forfeited when discriminatee physically tried to strike supervisor with bowling trophy, used profanity, and ripped telephone from wall). While Wallace concededly called Tiffany names, he did not in any way threaten to take any action against her or Respondent. See *Alto-Shaam*, *Inc.*, **307** NLRB 1466, 1467 **(1992)**; *Precision Window Manufacturing v. NLRB*, **963 F.2d 1105**, **1110** (8th Cir. **1992)** (forfeiting right to reinstatement **by** threatening to kill supervisor Accordingly, even if one accepts Tiffany's version of events that Wallace loudly asked her accusatory questions and held on to her car door for as long as a minute, such conduct plainly does not render Wallace unfit for further service. (NLRB Closing Brief, 06/11/11 page(s) 54-57)

46 As argued elsewhere in this brief, all of the alleged conduct which in Respondent's view gave rise to the original need for the TRO is either strongly denied **by** Wallace or was a mere continuation of his protected concerted activities as provoked **by** Respondent's unfair labor practice of having terminated him on the basis of his protected concerted activities. (Citation page(s) 57-58)

II. ARGUMENT; THE GROUNDS FOR THE EXCEPTION

Council for the Acting General Council, through witness' and Respondent's affidavits, interviews and later testimony, clearly proved that Respondent acted with animus, terminated the charging party without due process, produced a warning letter four day after termination, later manufactured cause, shifted reasons for termination, cited conflicted testimony amongst Respondent managers, Respondent concocted stories of misconduct without corroborating testimony; charging parties affidavit was never contested and stands un rebutted. With no credible evidence the threatening gesture and comment to Craig Fredericks on June 11, 2010, never took place. Even if the alleged acts that interfered with reinstatement did take place, it's been well cited that the conduct does not reach into forfeiting the ACT's protections. This exception would remedy the current incomplete ruling which limits the ACTS restorative relief.

HUMAN SERVICES **PROJECTS,** INC. d/b/a **TEEN** TRIUMPH

Case(s) 32-CA-25262

AND

JAKE WALLACE, an Individual

E-FILE SERVICE OF **THE NATIONAL LABOR BOARD** FOR THE **CHARGING PARTY'S EXCEPTION**

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DATE OF MAILING: August **5**, 2011

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